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No. 88-326

In the Supreme Court of the United States

OCTOBER TERM, 1988

HOWARD AND MARETTA SMITHSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners have a claim for breach of contract because the Farmers Home Administration (FmHA) on one occasion took almost 90 days to comply with a contractual provision that states, without any provision as to time limits or schedules for making loans, that FmHA will "make future" loans if funds are available and the applicants meet all regulations.

2. Whether an FmHA security agreement provision stating that the agreement "is subject to [the agency's] present regulations * * * and to its future regulations not inconsistent with [the agreement's terms]" makes the FmHA's entire body of rules enforceable against the agency in an action for damages for breach of contract.

3. Whether there were genuine disputes of material fact that precluded summary judgment against petitioners.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-10a) is reported at 847 F.2d 718. The opinion of the United States Claims Court (Pet. App. 11a-32a) is reported at 12 Cl. Ct. 345.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on May 11, 1988. On July 29, 1988, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including August 23, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves an alleged breach of contract by the Farmers Home Administration (FmHA). Between 1972 and 1983, FmHA made 15 emergency or farm ownership loans to petitioners (Pet. App. 15a). Under the Consolidated Farm and Rural Development Act, when a farmer "is unable to obtain sufficient credit elsewhere to finance his actual needs at reasonable rates and terms," the Farmers Home Administration is authorized to make loans for, among other purposes, operating family farms. 7 U.S.C. 1941-1947; see *Dahl* v. *United States*, 695 F.2d 1373, 1378-1379 (Fed. Cir. 1982).

To ensure repayment, FmHA required petitioners to execute five security agreements, which were standard FmHA forms containing the following clauses (Pet. App. 14a-15a):

> E. This Agreement is subject to the present regulations of the Secured Party and to its future regulations not inconsistent with the express provisions hereof.
>
> * * * * *
>
> J. Secured Party will make or insure future loan advances to Debtor to enable him to raise or harvest farm crops or raise livestock or other animals, provided funds are available and the Debtor meets all the current requirements imposed by regulations of the Secured Party.

On January 10, 1984, petitioners applied for a sixteenth FmHA loan (Pet. App. 15a). Approximately three weeks later, on February 2, 1984, after FmHA's county supervisor had worked with them to develop an annual financial and operating plan, known as a Farm and Home Plan (see 7 C.F.R. 1924.57(e) and (f)), the supervisor submitted

petitioners' application and plan to FmHA's state office (Pet. App. 15a). Petitioners allege that the Farm and Home Plan as submitted was inaccurate.

On February 15, 1984, less than two weeks after the county supervisor made that submission, the state office responded by setting conditions for petitioners' continued receipt of loans (Pet. App. 15a). Based on a new Farm and Home Plan, however, the county committee certified that petitioners had the necessary character and farming ability to qualify for a loan (see 7 C.F.R. 1941.12(a)(5), 1941.30, 1945.162(g)). Approximately three weeks later, the county supervisor forwarded the county committee's certification of eligibility for petitioners to the state office, along with a revised Farm and Home Plan (Pet. App. 15a). Within approximately four weeks of receipt of that information, on April 6, 1984, the state office advised the county supervisor that petitioners' loan application had been approved (*ibid.*). Five days earlier, however, petitioners had surrendered a tract of leased land that they had told FmHA they intended to farm in 1984, and they therefore declined to accept the loan (*ibid.*).

Two weeks after declining to accept the FmHA loan, petitioners requested that they be furnished loan-servicing relief for their existing loans (Pet. App. 15a-16a).[1] FmHA denied that request within four weeks of its receipt (*id.* at 16a).

2. Petitioners brought a breach-of-contract suit in the United States Claims Court seeking more than two million dollars for loss of their farming operation and damage to

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[1] When a farmer receives a loan from FmHA, he is expected to repay that loan according to a planned repayment schedule. When appropriate, however, an FmHA county supervisor may rewrite rates or terms for loans (reschedule loans), combine and rewrite the rates and terms of two or more loans (consolidate loans), or postpone payment of part of a loan installment (defer loans). 7 C.F.R. 1951.33 (1987).

their reputation based on FmHA's "delay" in granting their loan application and "failure" to consider them for loan-servicing relief (Pet. App. 16a, 27a). They asserted that FmHA's county supervisor used "false and misleading numbers" in completing their Farm and Home Plan "for the sole purpose of wrongfully denying [their] application," thereby delaying FmHA's approval (*id.* at 15a; Pet. 4, 7). Petitioners further claimed that the supervisor later neglected to consider them for loan-servicing relief (Pet. 7).

The Claims Court granted the government's motion for summary judgment (Pet. App. 32a). The court held that, to recover money damages against the United States, a litigant must point either to a provision of law that fairly mandates the payment of money sought or to a breach of a contractual obligation. Petitioners had pointed to neither (*id.* at 17a-18a). The court explained that they had made "no claim that any of the statutes relied upon is money-mandating" and had cited no contractual provision requiring that FmHA "timely" process their loan application or consider them for loan-servicing relief (*id.* at 21a, 26a, 28a).

The court further observed that petitioners misplaced their reliance on clauses E and J of their security agreements as the source of contractual duties. The court stated that, since clause J contained no express requirement or guarantee that FmHA would approve a loan within a specified period, FmHA fully adhered to that clause when it approved a loan for petitioners (Pet. App. 28a). The court added that, although clause E provided that the parties' security agreement would be subject to present and consistent future FmHA regulations, it was unreasonable for petitioners to infer from the language of this clause that "FmHA meant to obligate itself in wholesale fashion to comply with each FmHA regulation or risk breach of

contract damages" under its standard form security agreement (*id.* at 26a).

3. In an opinion by Judge Davis, the court of appeals affirmed (Pet. App. 1a-9a). As a threshold matter, the court observed that the Claims Court had "initial jurisdiction" over the case "because [petitioners] sued for breach of their contracts with FmHA," but that jurisdiction over petitioners' specific contentions must be "judged separately" (*id.* at 6a). The court further observed that, in examining those contentions, it could not, in the absence of record support, assume, as did petitioners, that FmHA officials had acted arbitrarily or in bad faith (*ibid.*; *id.* at 9a n.4). The court then addressed petitioners' claim that FmHA had breached its contract, either by violating its regulations, which petitioners contended were incorporated by clause E of their security agreement, or by unduly delaying the tender of requsted loan funds and other services that petitioners asserted were required by clause J (*id.* at 7a-9a). The court concluded that no breach of contract had occurred (*ibid.*).

The court held that clause E of the security agreement, which provided that the agreement would be "subject to" present and consistent future FmHA regulations, did not incorporate wholesale into the parties' contracts the mass of FmHA regulations (Pet. App. 7a). The court reasoned that, if the parties had wished to incorporate fully into their contracts all FmHA regulations, "they would have explicitly so provided" and that a "wholly new ground of obligation" should not be created on the part of the government by implication from clause E, which appears to say no more than that a "contract provision * * * contrary to a regulation would be invalid" (*ibid.*). The court noted that "the more natural reading of appellants' complaint is that its incorporation argument states, not a true

contractual claim, but a tort claim * * * for misfeasance and misconduct" (*id.* at 7a-8a).

The court also reasoned that clause J, which provided for "future loans and advances" to a borrower under specified conditions, "did not set any time limits or schedules" for such loans; nor did it cover servicing relief (Pet. App. 9a). Therefore, any undue FmHA delay in making the loan or failure to provide alternative relief was "vindicable, if at all, only in a tort action of which the Claims Court would have no jurisdiction" (*ibid.*). Finally, the court noted that, based on the record, it did not consider the less than 90 days FmHA took to approve petitioners' application to be an undue delay or an abuse of discretion (*ibid.*).

Chief Judge Markey concurred. He would have dismissed the appeal on the ground that petitioners' claims sound in tort and therefore are beyond the jurisdiction of the Claims Court and the Federal Circuit. Pet. App. 10a.

ARGUMENT

Since petitioners' application for a loan was approved by FmHA, they advance no claim that they were denied a loan. Instead, they make several arguments in support of the contention that they should be allowed to pursue an action in the Claims Court against the United States for FmHA's alleged failure to process their loan in a timely fashion. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or any court of appeals. Thus, no further review is warranted.

1. Petitioners contend (Pet. 9-17) that the courts below erred in holding that petitioners have no valid breach-of-contract claim (but at most only a tort claim that is beyond the jurisdiction of the Claims Court) for

FmHA's allegedly "undue" delay in processing their loan application. Petitioners contend that that holding is in conflict with the decisions of other courts of appeals. There is, however, no conflict.

In *Petersburg Borough* v. *United States,* 839 F.2d 161 (3d Cir. 1988), the court did suggest that an action for undue delay in furnishing a loan could be pursued as a breach-of-contract claim in the Claims Court. The basis for that holding, however, was that "the Borough's claim is for breach of *a promise by [FmHA]* to close timely" (839 F.2d at 163 (emphasis added)). There is no such promise in this case, for FmHA agreed only "to make or insure loan advances to [petitioners]" on certain conditions, without specifying any schedule for the making of such loans. Moreover, the *Petersburg* court was careful not to "imply that the Borough is or is not entitled to recover in [the Claims Court]" (*ibid.*).

United States v. *Huff,* 165 F.2d 720 (5th Cir. 1948), likewise does not conflict with the decision below. The case did not involve a promise to make loans at all, but rather a promise (in connection with the operation of an Army training camp on land farmed by the plaintiffs) that, "following the crossing of [specified] fences by the troops, the Government will restaple the said wire to the posts, and leave the fence in as good condition and repair as it was at the time of entry upon the leased premises by the Government" (165 F.2d at 723).

The court, quite understandably in light of the nature of the contract, construed the phrase "following the crossing of the fences by the troops" to "inject[ ]" a "time element" (165 F.2d 724) "even though no such word as 'immediately' precedes the phrase" (*id.* at 725). The government was held to have breached the contract because "the Government did virtually no repairing of the fences at *any* of the times in question" (*ibid.* (emphasis added)). The Fifth Circuit's

holding that the government breached that particular contract hardly implies that petitioners have a tenable claim for breach of the very different kind of contract involved in this case, which contains only a generalized promise to make loans if petitioners prove to be eligible, and neither specifies any time at which loans will be made nor by its nature suggests that the government intended to bind itself to make each and every such loan at a time that would fit petitioners' needs.

Petitioners' contention that the court below departed from principles recognized by this Court in *Hatzlachh Supply Co.* v. *United States,* 444 U.S. 460 (1980), and *Keifer & Keifer* v. *Reconstruction Finance Co.,* 306 U.S. 381 (1939), is also incorrect. Those cases stand only for the unexceptional proposition that a valid contract claim is not outside the jurisdiction of the Claims Court merely because it has elements of tort as well as contract. The decision below does not suggest that petitioners' claim fails *because* it might be tortious in nature; rather, the decision below merely suggests (without deciding) that petitioners, who have no valid contract claim, might nevertheless be able to state a valid tort claim.[2]

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[2] It is principally for that reason that there is no merit to petitioners' repeated claims (Pet. 12 n.3, 13 n.4, 17, 20 n.9, 22 n.11) of a conflict between the decision below and other decisions of the Federal Circuit or its predecessor the Court of Claims. Moreover, decisions of the Court of Claims are binding on the Federal Circuit (see *South Corp.* v. *United States,* 690 F.2d 1368, 1370-1371 (Fed. Cir. 1982) (en banc)), and any conflict of the sort petitioners allege would be a matter for the Federal Circuit, not this Court, to resolve. See *Wisniewski* v. *United States,* 353 U.S. 901, 902 (1957). We note, in this regard, that petitioners did not seek either rehearing or rehearing en banc in the Federal Circuit. In any event, the decisions that petitioners cite are not remotely in conflict with the decision below, and it is particularly ironic that petitioners apparently claim a conflict between the decision below, written by Judge Davis, and such decisions as *L'Enfant Plaza Properties* v. *United States,* 645 F.2d 886, 892 (Ct. Cl. 1981)

The gist of the decision below is not, as petitioners seem to believe, that all claims of undue delay in contract performance are tort claims that can never be pursued as contract claims in the Claims Court. Rather, it is that the contract at issue in this case simply was not breached by the modest delay that petitioners encountered in obtaining the loan that they sought in early 1984 (see Pet. App. 9a), at least in the absence of any record support for petitioners' claim that the agency acted in bad faith or engaged in misconduct (*id.* at 9a n.4). That holding is supported by the record and presents no issue of widespread importance warranting this Court's review.

2. Petitioners also contend (Pet. 17-24) that the court below erred in holding that the contract at issue in this case did not make every violation of an FmHA regulation into a contractual promise whose breach would give rise to an action for damages. That holding, however, is plainly correct.[3]

As the Claims Court (Pet. App. 22a) and Federal Circuit (*id.* at 7a) both readily acknowledged, contracts *can be* written in such a way that they incorporate agency regulations and make them binding on the government as a matter of contract. The question here is whether the contract between petitioners and FmHA *was* written so as to have that effect. Both courts below correctly held that it was not. The contract says nothing about incorporation of agency regulations as contractual obligations; all it says is that "[t]his agreement is subject to the present regulations of [FmHA] and to its future provisions not inconsistent with the express provisions hereof." The purpose of such a

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(Davis, J.), and *Commerce Int'l Co.* v. *United States*, 338 F.2d 81, 85 (Ct. Cl. 1964) (Davis, J.).

[3] It is, any event, unclear what duty imposed by regulation FmHA could possibly be said to have violated.

clause is to put contracting parties on notice that the terms contained in the contract are necessarily subordinate to legal obligations imposed by present and future regulations,[4] not to make the agency answerable in damages for each and every breach of one of its regulations (see *id.* at 26a).

There is no conflict between the Federal Circuit's decision and the decision in *Bodek* v. *Department of Treasury, Bureau of Public Debt,* 532 F.2d 277 (2d Cir.), cert. denied, 429 U.S. 849 (1976). In *Bodek,* the plaintiff sought to force the Treasury Department to issue him duplicate savings bonds when his parents refused to relinquish custody of bonds issued to him for his thirteenth birthday (532 F.2d at 278, 280). The issue was not, as here, whether a plaintiff could collect breach-of-contract damages for violation of a regulation allegedly incorporated into an agreement. Rather, the issue was whether, without regard to any contract, a statutory provision and implementing regulations for replacement of lost or stolen bonds (31 U.S.C. (1976 ed.) 738a; 31 C.F.R. 315.25) provided for replacement in such circumstances (532 F.2d at 280). In resolving the statutory issue, the court determined only that the son was not entitled to replacement because his claim did "not fall within the category of 'loss * * * ' covered under the * * * replacement provision" (*ibid.*). Thus, the court's footnote reference to Treasury regulations as "an implied part of the contract between the United States and a purchaser of its bonds" (*id.* at 279 n.7) was dictum and in any event referred to a kind of "contract"—the one arguably implied by law to exist between the government and every purchaser of its securities—different from the one at issue here.

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[4] Cf. *Federal Crop Insurance Corp.* v. *Merrill,* 332 U.S. 380, 384-386 (1947) (participants in government programs must abide by statutes and regulations even if not made an express part of their contract).

Nor is the decision below inconsistent with *Neal* v. *Bergland,* 646 F.2d 1178 (6th Cir. 1981), aff'd on other grounds *sub nom. Block* v. *Neal,* 460 U.S. 289 (1983). The court in that case *rejected* the plaintiff's "contract" claim on the ground that FmHA had no duty to provide technical assistance or to inspect and supervise construction when it made a rural housing loan to the plaintiff (646 F.2d at 1181). The court's observation (*ibid.*) that neither statute nor regulation imposed any such duty on the agency can hardly be taken to mean that, if such duties had existed, they would automatically have been enforceable in an action for damages for breach of contract.[5]

Petitioners can point to no decision of a court of appeals other than the court below in which, in the absence of a contract clause that incorporates agency regulations much more specifically than does petitioners' clause E, an agency has been held liable in damages for breaching regulations that concededly (see note 5, *supra*) do not by themselves support an action for damages. In the absence of such a conflict, review by this Court is not warranted.[6]

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[5] Indeed, a fair reading of the brief passage in *Neal* rejecting the "contract claim" suggests that the court was using that phrase as shorthand for all claims cognizable under the Tucker Act, 28 U.S.C. 1346(a)(2), 1491, and not just for claims that, strictly speaking, arise under a contract. See 646 F.2d at 1181 & n.4. In the present case, it is undisputed that petitioners have no valid Tucker Act claim for damages directly under the governing statute or regulations but must instead depend on their theory that those regulations were incorporated wholesale into the contract (Pet. App. 6a n.1, 21a). *Neal* does not support that theory.

[6] Since petitioners cannot point to any express contractual commitments by FmHA, they seek to create a "wholly new ground of obligation" by mere implication. But, as this Court has observed, liability cannot be imposed on the government "without clear words." *Pine Hill Co.* v. *United States,* 259 U.S. 191, 196 (1922). The Federal Circuit applied that principle here by refusing to infer governmental

3. Finally, petitioners contend (Pet. 25-30) that there were genuine disputes of material fact with respect to FmHA's good faith. All of the factual allegations that petitioners discuss, however, were explicitly assumed by the Claims Court to be true (Pet. App. 15a-16a), with two trivial exceptions.[7] Moreover, in observing that the time taken to approve the loan did not constitute undue delay (*id.* at 9a), the court of appeals merely relied on a fact that petitioners never disputed—that it took less than 90 days for approval of their 1984 loan application. There were no genuinely disputed issues of material fact that precluded the court from affirming the dismissal of petitioners' complaint.

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guarantees to petitioners that were not expressly stated (Pet. App. 7a). See *Somalia Development Bank* v. *United States,* 508 F.2d 817, 822 (Ct. Cl. 1974); *Eastport Steamship Corp.* v. *United States,* 372 F.2d 1002, 1010 (Ct. Cl. 1967) (Davis, J.); *Farm Security Administration* v. *Herren,* 165 F.2d 554, 562 (8th Cir.), cert. denied, 333 U.S. 875 (1948).

[7] Petitioners contend (or at least imply) that the county supervisor did not meet with the county committee on March 1, 1984 (Pet. 26), and that the county supervisor on or about that date told them to take their complaints to their Congressman (Pet. 26-27). Given the undisputed facts that the county committee's favorable certificate of petitioners' loan eligibility and a correct Farm and Home Plan were forwarded to the state office just one week later (on March 8, 1984) and led to the approval of a $265,000 loan within 30 days after that (on April 6, 1984), petitioners' assertions could not possibly "affect the outcome of the suit under the governing law." *Anderson* v. *Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). The delay of which petitioners complain in this case was that allegedly caused by the submission of an inaccurate Farm and Home Plan in early February 1984, and petitioners have come forward with nothing (other than bare allegations unsupported by record evidence) to suggest that anything more than an honest mistake could have caused that delay.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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